

Georgia Department of Natural Resources
Environmental Protection Division

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September 30, 2013

Honorable Bebe Heiskel, Sole Commissioner
P.O. Box 445
101 South Duke Street
LaFayette, GA 30728

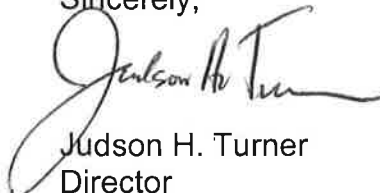
RE: Consent Order
EPD-WQ-5477
Durham Trail
Walker County

Dear Commissioner Heiskel:

This letter is to acknowledge receipt of the referenced signed Order. Enclosed is a copy of the executed Order. You are expected to comply with the conditions of the Order.

Your cooperation in this matter is appreciated.

Sincerely,



Judson H. Turner
Director

**ENVIRONMENTAL PROTECTION DIVISION
DEPARTMENT OF NATURAL RESOURCES
STATE OF GEORGIA**

IN RE: **Walker County**
91 Industrial Drive
Chickamauga, GA 30707

EPD-WQ- 5477

CONSENT ORDER

WHEREAS, Walker County (the "Respondent") has conducted land disturbing activity in Rock Creek and along the banks of Rock Creek in connection with a trail project known as the Durham Trail, Phase 3 (the "Site") located in Walker County, Georgia; and

WHEREAS, the Georgia Water Quality Control Act, O.C.G.A. §12-5-20 *et seq.* ("the Act"), at O.C.G.A. §12-5-30(a), requires that a permit must be obtained prior to discharging pollutants into the waters of the state; and

WHEREAS, the Water Quality Rules, Ga. Comp. R. & Regs, r. 391-3-6.01 *et seq.* ("the Rules"), provide at Rule 391-3-6.16 for the issuance of a general permit for storm water discharge from construction sites; and

WHEREAS, on August 1, 2008, the General Permit No. GAR100002 entitled "Authorization To Discharge Under The National Pollutant Discharge Elimination System Storm Water Discharge Associated With Construction Activity for Infrastructure Construction Projects" ("the Permit") became effective; and

WHEREAS, the Permit sets forth the limitations, monitoring requirements, and other conditions for the discharge of storm water from construction activities greater than or equal to one acre; and

WHEREAS, the Site is greater than one acre; and

WHEREAS, the Permit applies to the Site, but no individual NPDES permit was issued before construction commenced at the Site; and

WHEREAS, Rule 391-3-6.22 requires the submittal of fees associated with the Permit; and

WHEREAS, the EPD investigation, which commenced on March 26, 2012, (the "Investigation") determined that construction activity exceeding one acre had occurred without submitting a Notice of Intent ("NOI") or paying land disturbing fees; and

WHEREAS, Rock Creek is a designated trout stream; and

WHEREAS, the Investigation determined that on or before March 26, 2012, sediment, a pollutant, was deposited into Rock Creek; and

WHEREAS, the Respondent submitted an NOI on March 28, 2012; and

WHEREAS, the Investigation determined that construction activity was performed at the Site without an approved Erosion, Sedimentation, & Pollution Control Plan (“ESPCP”) as required by the Permit; and

WHEREAS, Rule 391-3-6-.03(5)(c) states that all waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses; and

WHEREAS, Rule 391-3-6-.03(5)(d) states that all waters shall be free from turbidity which results in substantial visual contrast in a water body due to a man-made activity; and

WHEREAS, compliance with Rule 391-3-6-.03(5) (d) requires proper design, installation, and maintenance of best management practices (“BMPs”) for construction activities and compliance with issued permits; and

WHEREAS, Part III, Section C of the Permit specifies that failure to properly design, install or maintain BMPs shall constitute a violation; and

WHEREAS, the Investigation determined that the disturbed acreage at the Site was larger than the area that was identified in the NOI submitted by the Respondent; and

WHEREAS, the Investigation determined that a comprehensive set of BMPs were not installed or maintained at the Site as part of the Site’s ESPCP, as required by part IV.D of the Permit; and

WHEREAS, the Investigation determined that the deficiency in the Site’s ESPCP is evidenced by the failure to properly install two rows of Type C silt fence along all state waters, the failure to properly install and maintain temporary stream crossings to access the Site during land disturbing activity, the failure to install and maintain a construction entrance for the Site, and the failure to stabilize disturbed areas, and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because construction plan sheets were not submitted for review as required; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because waters of the State were not properly identified; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because stream buffers were not properly delineated; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because disturbed areas were not properly delineated; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because limits of disturbance were not properly delineated; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because sampling locations and methods were not identified; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because sediment storage requirements were not addressed; and

WHEREAS, the Investigation determined that the ESPCP did not meet the requirements of Part IV.D of the Permit because detail drawings for structural BMPs were not provided; and

WHEREAS, the Investigation determined that sampling was not conducted as specified in Part IV.D.6 of the Permit and records of the sampling were therefore not maintained on the Site as required; and

WHEREAS, the investigation determined that BMP inspections were not conducted as specified in Part IV D.4 of the Permit and records of the inspections were therefore not maintained on the Site as required; and

WHEREAS, Part IV (ii) of the Permit establishes a 50-foot buffer on all waters of the State designated as trout streams; and

WHEREAS, Part IV (ii) of the Permit establishes limits on construction activities within the buffer without first obtaining a stream buffer variance; and

WHEREAS, the Investigation determined that land disturbance occurred within the 50 foot buffer zone, at the Site; and

WHEREAS, the Investigation determined disturbance of approximately 7,312 square feet of stream buffer; and

WHEREAS, no variance for this activity was granted by the Director; and

WHEREAS, on September 7, 2012, the Respondent and EPD entered into Consent Order EPD-WQ-5412 to resolve all of the allegations detailed in the foregoing paragraphs; and

WHEREAS, a third party appeal of the September 7, 2013 Consent Order was timely filed and has not been referred to the Office of State Administrative Hearings as EPD attempts to resolve the appeal through a negotiated settlement; and

WHEREAS, Consent Order EPD-WQ-5412 required that the Respondent pay to the State of Georgia upon execution of this Order a settlement of sixty-five thousand dollars (\$65,000.00); and

WHEREAS, the work conducted by Respondent at the Site has resulted in an unstable Site from which sediment continues to be deposited into Rock Creek; and

WHEREAS, EPD staff have observed and documented with photographs that the Site is not stable and the crossing is failing; and

WHEREAS, the damage at the Site has changed the hydrology of the stream so that fish cannot traverse Rock Creek upstream and downstream of the Site; and

WHEREAS, EPD has documented that portions of the bank where Respondent conducted land disturbing activity and inserted rip rap and fill have collapsed and sloughed away, and

WHEREAS, EPD has observed that the crossing structure creates a stricture point and pooling effect so that sediment and gravel naturally transported down Rock Creek during high flow events settles in front of the bottomless culvert stricture point; and

WHEREAS, EPD has observed the delta of sediment under the bottomless culvert is much more fine than that in front of the culvert, has no gravel, and has a more soil like appearance indicating it is fill dirt sediment that has sloughed off into the stream from where the Respondent placed it as the crossing structure fails; and

WHEREAS, EPD has observed that the stream has moved back to the path it was flowing before the Respondent did the land disturbing activity; and

WHEREAS, the Act provides at O.C.G.A. §12-5-52 that any person violating any provision of the Act or any permit condition or limitation established pursuant to the Act shall be liable to the State of Georgia for a civil penalty not to exceed sixty thousand (\$60,000.00) per day for each day during which such violation continues provided, however, that a separate and later incident creating a violation within a 12 month period shall be liable for a civil penalty not to exceed one hundred thousand dollars (\$100,000.00) per day for each day during which such violation continues; and

WHEREAS, an amicable disposition of all of these allegations concerning the Site is considered to be, for all parties concerned, in the best interest of the citizens of the State of Georgia .

NOW THEREFORE, the Director hereby ORDERS and the Respondent CONSENTS to comply with the following:

1. By agreement of the parties this Consent Order replaces Consent Order EPD-WQ-5412 which is deemed null and void upon execution of this Consent Order by the Director.
2. As a condition of replacing Consent Order EPD-WQ-5412, the Director agrees to allow the Respondent to use the sixty-five thousand dollars (\$65,000.00) settlement which was to be met through a SEP to be directed instead to the cost of implementing the CAP required by this Consent Order.
3. Respondent has retained the services of a licensed professional engineer with applicable credentials and experience who will prepare and supervise the implementation of a Corrective Action Plan (CAP) which will provide for removal of the current crossing structure installed by Respondent at the Site. The CAP may also include, at

Respondent's discretion, the installation of a prefabricated pedestrian bridge as detailed in paragraph 4 below. The CAP will provide for the removal of the two culverts, the rip rap, the fill dirt and any other materials placed in Rock Creek and along the banks of Rock Creek by the Respondent except for specific materials identified in the CAP which EPD deems necessary for bank stabilization and protection of water quality.

4. Respondent may elect to simply restore the site in accordance with the CAP and not install a new crossing of Rock Creek at the Site or Respondent may elect to install a new crossing at the Site as part of the CAP. If a new crossing is installed, it must consist only of an engineered prefabricated pedestrian steel truss bridge wide enough for pedestrian traffic. If such a bridge is installed it will neither be designed for nor intended to carry typical highway traffic. Instead, it may be designed to accommodate occasional lightweight maintenance vehicles, occasional lightweight law enforcement vehicles, and occasional lightweight emergency rescue vehicles. If a bridge is installed, it will be used commensurate with the multi-use purposes of the trail and will serve primarily as a pedestrian bridge. Traffic on the bridge will consist **only** of pedestrians, horses, bicycles and lightweight maintenance vehicles, lightweight law enforcement vehicles, and lightweight emergency rescue vehicles. No other vehicular traffic will be allowed on the bridge at any time. If a pedestrian bridge is installed it will be low maintenance and low impact on Rock Creek and will not impede fish from traversing Rock Creek at the Site. Respondent's Professional Engineer will create or approve the plans for the pedestrian bridge and supervise its installation. The installation of the bridge will be conducted in accordance with all applicable state and federal statutes, regulations, and permit requirements.
5. Respondent will retain the services of a landscape architect or other outside consultant with specific expertise in stream bank restoration and the CAP will include a stream bank restoration plan to restore the banks of Rock Creek to their natural state commensurate with the natural state of stream banks up and downstream. This stream bank restoration will include the planting of native vegetation to stabilize the banks. The density of the plantings will be comparable to the vegetation naturally occurring in the areas adjacent to the Site. The bank restoration plan shall specify the plant species and number of plants to be planted and include maintenance and monitoring plans until vegetation is established.
6. The CAP will be submitted to EPD for approval no later than thirty (30) days after execution of this Consent Order.
7. If an Army Corps of Engineers (ACOE) permit is required for execution of the CAP, Respondent will obtain the ACOE permit as soon as possible. To ensure that EPD can verify that Respondent obtains an ACOE permit in a timely manner, Respondent agrees to keep EPD informed as to how the ACOE permit application is progressing by providing EPD with a copy of its application and copies of emails and correspondence between Respondent and the ACOE.
8. The CAP will include detailed drawings and specifications as well as a narrative

explaining how the work required by this Consent Order will be completed. The CAP will include specific timelines for completion of the work. EPD will review and approve the proposed timelines. The work will be conducted in accordance with all applicable state and federal statutes, regulations, and permit requirements. Respondent will bear the burden of determining what permits will be required and will obtain all necessary permits.

9. Within fourteen (14) days of the execution of this Consent Order, Respondent will provide EPD with copies of all documents in its possession (i.e. invoices) that document the quantity of materials that were placed at the Site when Respondent conducted earlier work at the Site.
10. Upon completion of the work required by the CAP, Respondent and Respondent's licensed professional engineer will certify in writing that all elements of the CAP have been completed as approved by EPD.

Time of Essence. Time is of the essence of this Order. Upon it becoming effective, Respondent shall promptly commence its undertakings required herein and shall diligently pursue the accomplishment thereof.

Required Submissions. Upon the submission of any plan, report, or schedule, or any modified plan, report or schedule, required by this Order, EPD shall review the submission to determine its sufficiency. EPD shall notify the Respondent in writing whether the submission is approved or disapproved.

If EPD determines that a submission is disapproved, it shall provide Respondent with a written notice of the deficiencies of the submission. The Respondent shall have fifteen (15) days from the issuance of EPD's notice of deficiency to modify the submission to correct the deficiencies and resubmit it to EPD.

Notwithstanding the foregoing, the failure of Respondent to provide EPD with an ultimately approved submission within a reasonable time as determined by the Director may, in the sole discretion of the Director, be deemed a violation of this Order. Upon approval by EPD, all submissions required by the terms of this Order are incorporated by reference into, and made a part of, this Order. Except as may be provided by this Order, noncompliance with the contents of such approved submissions shall be deemed noncompliance with this Order.

EPD approval of any submission required by this Order is not intended as, nor shall such approval be construed as, certification by EPD that compliance with relevant state and federal laws, regulations, and permits will thereby be achieved, and such approval by EPD shall not provide Respondent with a defense to an enforcement action taken by the Director pursuant to violations of the same. EPD approval of any submission is strictly limited to the technical aspects of the submission and is not intended as, nor shall it be construed as, approval or acceptance of any statements, assertions, or representations of fact, of opinion, or of a legal nature that are contained in the document.

Force Majeure. Failure to complete a condition mandated by this Consent Order within the time period specified may be excused and not subject Respondent to further enforcement action if the failure is the result of a force majeure event as identified below and Respondent complies the requirements set forth below. Respondent shall have the burden of proving to EPD that it was rendered unable, wholly or in part, by Force Majeure to carry out its obligations.

The term "Force Majeure" as used herein shall be limited to the following: Act of God; strike, lockout, or other labor or industrial disturbance not caused by an unfair labor practice by the Respondent; act of the public enemy; war; blockade; public riot; fire; storm; flood; explosion; failure to secure timely and necessary federal, state, or local approvals or permits, provided such approvals or permits have been timely and diligently sought; or other delay caused by unforeseeable circumstances beyond the reasonable control of Respondent, its employees, agents, consultants, or contractors, as determined by EPD in its sole discretion. Force Majeure does not include financial inability to perform an obligation required by this Consent Order, a failure to achieve compliance applicable regulatory permits, or inaccessibility or unavailability of or inability to use any particular type of machinery or vehicle in the conduct of complying with the CAP.

Respondent shall notify EPD verbally within 48 hours (or no later than the beginning of the next business day if the expiration of the 48 hours occurs on a weekend or holiday) from the time Respondent learns, or in the exercise of reasonable diligence should have learned, of any Force Majeure circumstances that may reasonably be expected to cause a schedule or performance delay. Within 10 days of such time, Respondent shall submit to the EPD a written notice of as to the anticipated length (if known) and cause of any delay due to Force Majeure. Failure to so notify EPD shall constitute a waiver of any claim to Force Majeure.

The Respondent and EPD agree to negotiate informally and in good faith to identify delays resulting from Forces Majeure. Respondent shall comply with EPD's determination as to the appropriate time period to be excused by Force Majeure, which shall be communicated to Respondent in writing. In the event that any circumstance or series of circumstances cause the schedule to extend over thirty (30) calendar days, Respondent and EPD shall meet formally to assess the overall schedule impact and attempt to mitigate same. Any Force Majeure or Forces Majeure that cause the schedule to extend over sixty (60) consecutive days shall be noticed to the citizens of Walker County in a form to be determined by the EPD.

If EPD determines that Force Majeure has occurred, the affected time for performance specified in this Consent Order shall be extended for a period of time equal to the delay resulting from such Force Majeure. Respondent shall exercise due diligence and adopt all reasonable measures to avoid or minimize any delay.

Stipulated Penalties. For each day that Respondent fails to comply with the deadlines specified in this Order, or any approved submission required by, and made a part of this Order, stipulated penalties in the amount of one thousand dollars (\$1,000.00) per day shall accrue on the day performance is due, and shall continue until the violation is corrected.

This Order does not waive the Director's right to take further enforcement action against Respondent, or imply that the Director will not take such action, either for (1) the violations

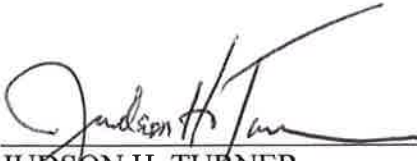
alleged herein if Respondent fails to fully comply with the conditions of this Order, or (2) violations not alleged herein based on any other relevant requirements of this Order, the law, rules, and permit(s). Issuance of this Order does not waive the Director's right to use the violations alleged herein, upon sufficient evidence, to show past violations in any subsequent enforcement proceeding.

This Order is executed and entered solely for the purpose of resolving and disposing of the alleged violations set forth herein and does not constitute a finding, adjudication, or evidence of a violation of any law, rule, or regulation by Respondent, and, by consenting to this Order, Respondent does not admit to any factual allegation contained herein or to any violations of State laws. In addition, this Order is not intended to create and it shall not be construed or otherwise deemed to recognize or create any claim, right, liability, estoppel, or waiver of rights in favor of any third-party or parties.

By agreement of the parties, this Order shall have the same force and binding effect as a Final Order of the Director, and shall become final and effective immediately upon its execution by the Director. The parties further agree that this Order shall not be appealable by Respondent, and Respondent hereby waives its right to initiate any administrative or judicial hearing on the terms and conditions of this Order.


Unless modified or terminated by a subsequent order, or otherwise specified in writing by the Director, this Order shall be deemed satisfied and terminated upon full, complete, and timely performance of each and every condition set forth herein.

It is so ORDERED, CONSENTED, and AGREED to this 30 day of September, 2013.



JUDSON H. TURNER
Director, Environmental Protection Division

FOR RESPONDENT: Walker County

BY: 
Bebe Heiskell
Commissioner of Walker County